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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
SITTING AT AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
2/27/2019
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THOMAS MICHAEL DIXON,
Appellant v.

THE STATE OF TEXAS,
Appellee

RESPONSE TO STATE'S PETITION FOR DISCRETIONARY REVIEW

From the Seventh Court of Appeals, sitting at Amarillo, Texas
Seventh Court of Appeals No. 07-16-00058-CR
140th District Court No. 2012-435,942, Honorable Jim Bob Darnell, Presiding

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Trial Judge:

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INTRODUCTION

The Court of Appeals unanimously[1] overturned Appellant's convictions for capital murder on the grounds that the State admitted[2] CSLI (166 days of data) it obtained in violation of the Fourth Amendment[3] and because the Court closed the courtroom to the public during critical stages of the proceedings in violation of the Sixth Amendment.[4] *See Dixon v. State*, No. 07-16-00058-CR (Tex. App. – Amarillo December 13, 2018).[5] In addition, the State conceded that the Court of Appeals should sustain Appellant's double jeopardy point of error; stating that "the guilty verdict on count two of the indictment should be abandoned." State's Response Appeal Brief, p. 56.

STATE'S COMPLAINTS

The State's Petition for Discretionary Review (Petition) does not raise cognizable grounds as provided in Texas Rules of Appellate Procedure 66.3. The State neither suggests that the Court of Appeals' opinion departs from the law as pronounced by the Court of Criminal Appeals or the United States Supreme Court

[1] Chief Justice Quinn concurring.
[2] The State collected 166 days of Appellant's CSLI using an application for stored communications that did not set out probable cause to obtain it as evidence of any offense.
[3] United States Constitution.
[4] United States Constitution.
[5] The Court of Appeals did not sustain the Appellant's sufficiency of the evidence points of error, but elsewhere in the opinion noted that Appellant's elaborate efforts to "diminish Sonnier's standing with Shetina would have been unnecessary, of course, if the plan were simply to kill [Sonnier]." *Dixon v. State*, No. 7-16-00058-CR, slip op. p. 32 (Tex. App. – Amarillo December 13, 2018).

either substantively or as a part of an applicable standard of review nor that the case presents a question that has not been decided by this Court, but that should be decided. Further, the Petition does not suggest that the Courts of Appeal are in conflict regarding how they should resolve a legal question. Instead, the State asks this Court to act as an appellate court to review the decision of the Court of Appeals with which it disagrees. It is well settled that a petition for discretionary review is not an appeal within the constitutional purview of Article V, §26, Texas Constitution. *Todd v. State*, 661 S.W.2d 116, 121-122 (Tex. Crim. App. 1983). Moreover, the State did not request rehearing of the Court of Appeals' opinion in the Court of Appeals either to the panel or *en banc*. Despite the fact that the issues raised are not cognizable on a petition for discretionary review, counsel will discuss that the Court of Appeals opinion is correct in overturning Appellant's convictions and in remanding the case for a new trial.

GROUND ONE IS THAT THE STATE DISAGREES WITH THE COURT OF APPEALS CONCERNING THE FACT THAT APPELLANT PRESERVED ERROR

The State's complaint is that it disagrees that Appellant preserved error at the three critical stages where the Trial Court closed the courtroom: during jury selection [excluding a member of the media]; during counsels' discussion of a *Brady* violation at trial outside the presence of the jury [where the Court admonished counsel to "chill out"]; and during closing argument [where the Bailiff enforced a no standing room

order of the Court by requiring a one-in-one-out rule for the public even though seats remained open in the courtroom]. The Court of Appeals found that Appellant had "preserved his closed courtroom complaints by timely objection." See *Dixon v. State*, No. 07-16-00058-CR, slip op. p. 36 (Tex. App. – Amarillo December 13, 2018). Counsel objected to the exclusion of persons during voir dire and closing arguments at the first opportunity he had, once he became aware of the closure. Since the exclusions occurred behind counsel's back above and he objected upon learning of it, it is preserved. *Taylor v. State*, 489 S.W.2d 890, 892 (Tex. Crim. App. 1973) [stating that a showing appellant did not have an opportunity to object at the time of the error preserved the complaint]. In addition, counsel objected to the closed courtroom during trial when the Judge excluded all members of the public in front of counsel. Counsel immediately objected to the closure under "*Presley v. Georgia*." 7R143. Thus, the Court of Appeals' finding that error was timely preserved is correct.

THE STATE SUGGESTS THIS COURT GRAFT ADDITIONAL REQUIREMENTS TO CLOSED PROCEEDING ERROR

In this first point for review, the State also suggests that this Court graft additional requirements to show this structural error. Namely, it suggests that a closure must be complete and prolonged even though *Lilly v. State*, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012) [citing *Presley v. Georgia*, 558 U.S. 209 (2010)] explains that the Appellant need not show that any particular person was excluded.

The "**focus is not on whether the defendant can show that <u>someone</u> was actually excluded.** Rather a reviewing court must look to the totality of the evidence and determine whether the trial court fulfilled its obligation to take **every reasonable measure to <u>accommodate public attendance</u>** at criminal trials." *Id.* Thus, *Lilly* describes that the Appellant need not show that any member of the public was actually excluded from those able to attend trial, but only that the Court did not take every reasonable measure to accommodate public attendance. *Lilly* does not require that Appellant show complete or long-term closure of the courtroom. Thus, Appellant need not have shown that any member of the public was excluded from the courtroom, nor that all members of the public were excluded from the courtroom, but need only show that the Court did not take every reasonable measure to accommodate the public desiring to attend these critical stages of the public proceeding. *Cameron v. State,* 482 S.W.3d 576 (Tex. Crim. App. 2016).

On two occasions in Dixon's trial, no member of the public was permitted to observe the proceeding and closing argument not all the members of the public who desired to attend were permitted in the open seats. Where portions of the public are excluded from trial, it is the public's right to attend that is also denied.

The State relies upon *U.S. v. Osborne,* 68 F.3d 94 (5th Cir. 1995) to propose these additional requirements of complete closure for long duration. But its reliance on *U.S. v. Osborne,* 68 F.3d 94 (5th Cir. 1995) is misplaced for two reasons.

Osborne, supra, does not stand for the propositions that a closure must be complete or prolonged.[6] These propositions are contained no place in the opinion. In addition, the Court of Criminal Appeals is not bound by federal courts of appeal. *See Ex parte Evans,* 338 S.W.3d 545, 552 n.27 (Tex. Crim. App. 2011) [Court of Criminal Appeals is not bound by cases out of the Fifth Circuit Court of Appeals]. Further, no harm analysis is performed concerning the structural error when a proceeding is closed to the public. The closure is structural error. *Steadman v. State,* 360 S.W.3d 499 (Tex. Crim. App. 2012).

EXCEPTIONS TO OPEN COURTS RULE MUST OVERRIDE THE RIGHT TO PUBLIC PROCEEDING AND WHAT PROPONENT OF CLOSURE MUST ALSO SHOW

The party seeking to close the proceeding must advance an overriding interest (an exception) that is likely to be prejudiced if the proceeding is not closed. *Waller v. Georgia,* 467 U.S. 39 (1984). Overriding interests have included the right to

[6] The State's citation to courts that recognize a *de minimis* closure is problematic. Petition, p. 16, n 3. None of the cases is from the Court of Criminal Appeals or the United States Supreme Court. And only the case from the Massachusetts Supreme Court cited in footnote 3 post-dates *Presley v. Georgia,* 558 U.S. 209 (2010). It post-dates the decision by one month and relies on pre-*Presley* cases to discuss the concept of *de minimis* closure without ever deciding it. Thus, the discussion of *de minimis* closure is *obiter dicta* in *Commonwealth v. Cohen*, 921 N.E.2d. 906 (Mass. 2010). Instead, *Commonwealth v. Cohen*, 921 N.E.2d. 906 (Mass. 2010) discusses jury contamination caused by a one-in-one-out procedure for spectators. It is not at all clear that that a closure can be *de minimis* after *Presley*. A consideration of whether something is *de minimis* includes harm analysis, which is inapplicable to structural error. In addition, *Peterson v. Williams,* 85 F.3d 39 (2d Cir. 1996) and *Braun v. Powell,* 227 F.3d 908 (7th Cir. 2000) [relying entirely on *Peterson, supra*] in footnote 3 have been called into question by the Second Circuit Court of Appeals in *U.S. v. Gupta,* 699 F.3d 682 (2d Cir. 2011)[doubting the viability of a triviality exception to closed courtroom structural error].

protect a minor child who was the victim of graphic sexual abuse who was being examined for competency and to protect matters presenting private and sensitive information of collaterally surveilled innocent members of the public. *Presley v. Georgia*, 558 U.S. 209, 213 (2010) [right to public trial may give way to government's interest in inhibiting disclosure of sensitive information]; *Waller v. Georgia*, 467 U.S. 39, 45 (1984) [sensitive information of persons who were incidentally wiretapped and were not charged with RICO crimes should be protected from disclosure to the public].

The closure must be no broader than necessary to protect that interest. *Waller v. Georgia*, 467 U.S. 39, 48 (1984). However, here, no overriding interest existed or was ever identified by the Court. And the Court considered no means less than closure to address any interests it raised. There was, in fact, room for the excluded member of the media and the public to be seated during voir dire and trial; despite the closure of the court caused by the Judge's concern that every person in attendance be seated.

The Trial Court must also make findings adequate to support a closure. Here, the Court made no such findings. The Court of Appeals abated the appeal and remanded the case to the Trial Court to make such findings. However, the Trial Court did not address the matters that are required.

Those requirements are that:

> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Waller v. Georgia*, 467 U.S. 39, 48 (1984).

The court must identify an interest that overrides the right to an open proceeding. Here, the Court expressed interest in every observer being seated and speculated that courtroom decorum might become problematic generally. These are not overriding interests to an open proceeding. The Court must also have engaged in no closure broader than necessary to address the issue it raised. Here, the closure occurred in a manner that excluded members of the public even though open seating was still available. Thus, the closure was unnecessary and overly-broad. The Trial Court must also consider reasonable alternatives. Here again, open seating was available in the closed courtroom and another room, the central jury room, could accommodate twice the observers and was available and could be utilized for trial. The Trial Court did not consider this. Finally, the Court must make findings concerning each of these matters. Even though the Trial Court was provided an opportunity on abatement and remand to make such findings, it found that no overriding interests were served by closure that would have been prejudiced by the courtroom remaining open, and with respect to which no reasonable alternative means existed.

THE TRIAL COURT'S FINDINGS

On each occasion where the proceedings were closed, the Court identified no interest that overcame the right to an open proceeding. Regarding its exclusion of the media person, it found that on the first day of jury selection the Court was unaware that the person had been excluded and immediately upon learning of his exclusion the Court placed him in available seating to observe voir dire. 4CRSupp[7]30-32. *Presley v. Georgia*, 558 U.S. 209, 213 (2010) expressly holds that voir dire is a critical stage of the proceeding that must be conducted in open court. Unbeknownst to counsel, the bailiff discussed the capacity of the courtroom where the case was tried with the Court and decided to impose a one-in-one-out rule without regard to the seating capacity of the courtroom after the Judge indicated that observers must be seated. 23R35; ll.11-23. The Court did not address why it was that the media person had been excluded. Apparently, there was available seating for the media person to attend and observe voir dire. 4CRSupp31. Regarding the exclusion of all members of the public from trial except counsel to the proceedings, the Trial Court found that near the half point of trial the Court decided to admonish the lawyers. 4CRSupp30-32. The Judge ordered everybody but the lawyers excluded

[7] CRSupp refers to the supplemental clerk's record. The number 4 indicates that this is the fourth supplement.

from the courtroom and admonished counsel to "chill out." Counsel immediately objected to the closure under "*Presley v. Georgia*." 7R143.

The Court also found that the courtroom was full during closing arguments and that it closed the proceedings to maintain courtroom decorum and minimize juror distraction. 4CRSupp31. There was no problem of public decorum or jury distraction during the trial. The Court's concern was speculative. Further, the Court considered no reasonable alternative to the one-in-one-out rule imposed by the bailiffs. The remaining open seats in the courtroom should have been utilized or the Judge should have considered using the central jury room to conduct the trial. 23R42-43; 23R23-24. It was available and could have been utilized for trial.

THE COURTROOM CLOSURE WAS COMPLETE DURING TRIAL

Lawyers from the District Attorney's office and their investigators were present [7R145-146] as was Rod Hobson, counsel for the witness Paul Reynolds. 8R80.

> "Dan Hurley: That's Brady.
> Frank Sellers: And you weren't going to turn it over.
> The Court: Hey y'all, chill out. Everybody-**if everybody would please excuse yourself from the courtroom except for the attorneys**.
> Frank Sellers: We object your Honor. That's a violation of Presley v. Georgia." 7R143.

> "Mr. Hurley: I want to say for the record that the Court has excused about 50 people from the gallery, and they are not present for this conference, this discussion we're having. We object under the 6th Amendment, the 14th Amendment and right now it's basically all lawyers and staff from the D.A.'s office in the courtroom and all the public has been excused." 7R145.

The only people remaining in the courtroom worked for the State of Texas or were lawyers in the proceeding; they were not members of the public.

THE COURT MUST CONSIDER REASONABLE ALTERNATIVES TO CLOSURE

The Trial Court must consider reasonable alternatives to closing the hearing. *Waller v. Georgia*, 467 U.S. 39 (1984). But the Court did not consider a bench conference during this exchange as a narrow alternative to closing the courtroom to the public.

And regarding its exclusion of members of the public from closing argument, the Court found that the courtroom was filled to capacity with spectators and that regulation of entrants was done for safety reasons, to maintain courtroom decorum, and to minimize jury distraction. 4CRSupp30-32. No evidence of safety concerns or any jury distraction was extant, nor did the Court find any such issues existed. Thus, there was no showing that these interests existed or would be prejudiced by not closing the proceedings to the public. In fact, the testimony was that seats were open, unoccupied, and available for the public. 23R37-38. There were still empty seats to be used by the public. 23R42-43; 23R23-24 ["There were empty seats… where people could sit down"]. And the Court did not consider that the central jury room was open and available to function as a trial court with twice the audience capacity of the courtroom in which Appellant's case was tried. The use of the central

jury room provided a narrowly tailored alternative to closure of the courtroom, as was use of the empty seats in the courtroom where this case was tried. *Andrade v. State,* 246 S.W.3d 217 (Tex. App.—Houston [Dist. 14] 2007, pet. ref'd) holds that so long as spectators are orderly, there is no reason to close a proceeding. There was no evidence or finding that the spectators, here, were anything but orderly. None of the stated interests overcame Appellant's right to an open proceeding.

Further, the Court did not consider the reasonable alternative of the large central jury room that would have accommodated more members of the public to attend the proceeding. Nor did it consider a bench conference to admonish counsel. The Court considered no reasonable alternative means to address its subordinate concerns in a narrowly tailored manner. In sum, the Court made no findings, even had they been factually supported by the record, that would support closing the courtroom to members of the public.

Even if this Court were to grant the Petition to conduct an appellate review of the Court of Appeals' decision, that decision should be sustained with regard to the closure of the courtroom during Appellant's trial.

CONSTITUTIONAL ERROR WAS PROPERLY ANALYZED UNDER RULE 44.2(a) AND COURT OF CRIMINAL APPEALS AND UNITED STATES SUPREME COURT PRECEDENT

The State complains, in a second point, that the long-standing analysis of constitutional error applied by the Court of Criminal Appeals and the United States

Supreme Court over the years is inconsistent with Texas Rule of Appellate Procedure 44.2 (a).[8] However, this Court has long held that Rule 44.2(a) is consistent with the rule announced by the United States Supreme Court in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 829 (1967)[9]. *Westbrook v. State*, 29 S.W.3d 103 (Tex. Crim. App. 2000) [*citing* Rule 44.2(a)]:

> "Having determined an error of constitutional magnitude occurred we now conduct the concomitant harmless error analysis to determine if reversal of appellant's punishment is appropriate. The critical inquiry is whether the error may have contributed to appellant's conviction or punishment. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 829 (1967). If there is a reasonable likelihood that the error materially affected the jury's deliberations than the error was not harmless beyond a reasonable doubt."

In *Dixon v. State*, No. 07-16-00058-CR, slip op. at pages 33-34 (Tex. App. – Amarillo December 13, 2018) the Amarillo Court Appeals properly applies this test in reversing Appellant's conviction for constitutional error.

> "We have reviewed the entirety of the evidence in a neutral light. Having done so, we cannot say that beyond a reasonable doubt the

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[8] Tex. R. App. Proc. 44.2 provides in pertinent part:

> (a) **Constitutional Error**. If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

[9] *Chapman, supra,* was recognized by *Graham v. Perez*, 2011 US District Lexis 41001 (S.D.N.Y. 2011) as inapplicable to federal review of constitutional claims presented on federal habeas review of state court convictions only in light of the Anti-terrorism and Effective Death Penalty Act. This Act only applies to the review of federal constitutional claims made in federal writs of habeas corpus addressing state court convictions.

> erroneous admission of appellant's cell tower location information did not contribute to his conviction."

Carter v. State, 463 S.W.3d 218, 223 (Tex. App.—Amarillo 2015), cited by the State on page 21 of its Petition, does not apply a different analysis. In application the four point *Carter* test, the Court found the error under consideration is constitutional error, notes that the erroneously presented evidence was presented in testimony and argument, that it cannot find that the evidence had no effect on the jury verdict beyond a reasonable doubt, and found that the evidence of guilt was not so overwhelming so as to allow the Court of Appeals to conclude that the evidence had no effect on the verdict beyond a reasonable doubt.

In *Dixon v. State*, No. 07-16-00058-CR, slip op. at page 26 (Tex. App. – Amarillo, December 13, 2018) the Amarillo Court of Appeals finds that the error is of constitutional dimension; that the State presented the evidence through witness testimony, charts and maps, and argued it to the jury; and concluded when considering all the evidence that it could not say that the evidence had no effect on the verdict beyond a reasonable doubt. Even though the jury was presented with text messages between Appellant and the killer, the Court of Appeals found that the CSLI was "unique" because it painted a picture of the killer and Appellant in Lubbock together at the same time and near a place Dr. Sonnier frequented. The State used this evidence to imply that Appellant had plotted together with Shepard in Lubbock near where Dr. Sonnier, the decedent, engaged in recreational dance classes and in

the town where he lived and worked. The Court of Appeals noted that Appellant had an undisputed alibi at the time of Dr. Sonnier's killing at 7:30 p.m., July 10, 2012; when Appellant was in surgery in Amarillo.[10] In fact, the text messages show the killer, David Shepard, lying to Appellant at 7:43 p.m. on July 10, 2012; stating that he was still staking out Dr. Sonnier's house and that Dr. Sonnier had not shown up yet. In fact, Shepard had already killed Dr. Sonnier by that time.

It was only through the CSLI that the State was able to present specific points where it argued that Dr. Dixon and David Shepard were scouting out D'Venue, the dance studio where the decedent took lessons in Lubbock; despite Appellant's protestations to the contrary. This evidence of Appellant's presence with Shepard there on the same day was used by the State to belie the Appellant's testimony that he had never been in Lubbock with Shepard. The Court of Appeals noted the strong impact this made on the jury. The Court of Appeals said that this evidence was used by the state to "form[] a main pillar supporting the state's argument to the jury that Appellant could not be believed." *Dixon v. State*, No. 07-16-00058-CR, slip op. at page 29 (Tex. App. – Amarillo December 13, 2018).

"No text message in evidence refers to any intention to harm or kill Sonnier or even to confront him physically." *Dixon v. State*, No. 07-16-00058-CR, slip op at pages

[10] "There was no evidence that appellant was present at the time of Sonnier's murder. In fact, undisputed alibi evidence established appellant was in Amarillo at the time." *Dixon v. State,* No. 07-16-00058-CR, slip op. at page 3 (Tex. App. – Amarillo December 13, 2018).

30-31 (Tex. App. – Amarillo December 13, 2018). Neither do the messages refer to photos. The Court of Appeals noted that Appellant's elaborate efforts to "diminish Sonnier's standing with Shetina would have been unnecessary, of course, if the plan were simply to kill [Sonnier]." *Dixon v. State*, No. 7-16-00058-CR, slip op. p. 32 (Tex. App. – Amarillo December 13, 2018). The Court of Appeals, looking at the evidence in a neutral light, found that the text messages could be viewed as encouraging some unstated action; taking of photos or killing Sonnier. So it was the CSLI that formed the pillar of the State's argument that Appellant was lying about his presence in Lubbock with Shepard and, thus, that he must also be lying about his lack of knowledge concerning Shepard's plan to shoot Sonnier.

This is precisely what the State argued in its opening closing and its ultimate closing arguments.

> "Is there any doubt in your mind now that Mike Dixon was with Dave Shepard on the D'Venue on March the 12th? He looked you in the eye and said 'Nope, never been to Lubbock with Dave Shepard before.' And we - all these things hinge on the credibility of the defendant." 22R96.

> "Now remember that the defendant testified as well that he never came to Lubbock with Shepard. He told you that during his examination, never came to Lubbock with Shepard. Let's look at March 12 of 2012. [Describing each of the points on exhibits where Appellant's CSLI appears in Lubbock and near D'Venue with Shepard also showing proximity.] They are hitting off the same tower on their call. …And near D'Venue…." 22R38-39.

In its two closing arguments, the State focused on the CSLI as the alleged key stone for the jury to tell through objective tangible evidence that Appellant was allegedly lying about his involvement with Shepard and being a part of killing Dr. Sonnier. The State also used 67 satellite maps based on CSLI and 55 pages of cell phone records (four which were of 166 days of Appellants CSLI) in evidence.

The Court of Appeals performed the proper test concerning the violation of Appellant's Fourth Amendment rights and obtaining 166 days of his CSLI for use before the jury. It weighed the evidence in a neutral light and could not conclude that the evidence did not have an effect on the jury verdict beyond a reasonable doubt. It found that the evidence was not otherwise overwhelming.

The CSLI was the focal point of the State's case and provided its litmus test urged by the State to disbelieve and convict Appellant.

This Court should not engage in an appellate review of the Court of Appeals' decision. However, even were it to consider doing so, the Court of Appeals' decision was properly reached and should be upheld.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document does comply with the word-count limitations of Tex. R. App. P. 9.4(i) because it contains 4,231 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

By: /s/ *Cynthia E. Orr*
Cynthia E. Orr

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been electronically transmitted and served on opposing counsel, Lauren Murphree, Assistant District Attorney, Lubbock County District Attorney's Office, via the e-FileTexas e-filing system, on this 26th day of February 2019. I additionally certify that on this day service was made via the State e-filing service on Stacey Soule, the State Prosecuting Attorney, at information@spa.texas.gov.

By: /s/ *Cynthia E. Orr*
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